INDEX

CITATIONS

Cases:

STATUTES:

MISCELLANEOUS:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 84

UNITED STATES, *Appellant*,

v.

MILAN VUITCH, *Appellee*.

On Appeal From the United States District Court for the District of Columbia

---

Brief for the Joint Washington Office for Social Concern, Representing the American Ethical Union, American Humanist Association and the Unitarian Universalist Association and for the Unitarian Universalist Women's Federation as Amici Curiae

---

OPINION BELOW

The memorandum opinion of the United States District Court for the District of Columbia is reported in 305 F. Supp. 1032.

JURISDICTIONAL STATEMENT

On November 10, 1969, the United States District Court for the District of Columbia entered an order dismissing the indictment on the ground that the statute upon which it was founded is too vague to meet the requirements of due process of law in criminal prosecutions and intimated that the statute in question denies equal protection of the law to certain people of the District of Columbia. Notice of appeal was duly filed by the Government on December 10, 1969. Jurisdiction of this court rests on Section 3731, Title 18, of the United States Code which authorizes an appeal by the Government from district courts direct to this court in criminal cases where the decision or judgment dismisses or sets aside an indictment on the ground of invalidity or construction of the statute upon which the indictment is founded.

QUESTIONS PRESENTED

1. Whether the Court has jurisdiction.

2. Whether the District Court was correct in declaring the abortion statute to be unconstitutional by reason of its vagueness.

3. Whether the abortion statute by reason of its vague and imprecise language discriminates against women in low-income brackets in violation of due process and equal protection of the law.

STATUTES INVOLVED

The Act of Congress, March 3, 1901, 31 Stat. 1322, ch. 854, Sec. 809, amended by Act of June 29, 1953, 67 Stat. 93, ch. 159, Sec. 203 (22-201 District of Columbia Code), provides in part that

> Whoever, by means of any instrument . . . or other means whatever, procures or produces or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as necessary

for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned. . . .

Title 18, Section 3731 of the United States Code provides in part that

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances: From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

THE INTEREST OF AMICI CURIAE

The Joint Washington Office for Social Concern represents a cooperative effort by three groups to apply humanist ethics and liberal religion to major problems of American society. It recognizes abortion as one of those problems. Its concern over this question centers, *inter alia*, on the civil rights of women and on the obstacles placed by the abortion statute before women in economically disadvantaged circumstances.

The Unitarian Universalist Women's Federation is a group of church women who actively support efforts to achieve equal rights for women and to repeal abortion laws in the several states on the ground that such laws restrict freedom of choice on the part of women specifically and deny equal protection to women in general.

STATEMENT OF THE CASE

The appellee, a licensed physician in the District of Columbia, was indicted in two counts charging him with violations of Section 22-201 of the District of Columbia Code (R. 2) otherwise known as the abortion statute.

He moved to dismiss the indictment (R. 11) on the ground of vagueness of the statute and alleged that in

effect it denies equal protection to people in certain economic and other groups subject to its sanctions.

After considering the briefs and background material in addition to argument of counsel the court granted appellee's motion and entered an order dismissing the indictment (R. 14).

After noting the two conditions under which abortions may be performed legally under the statute and, *inter alia*, the suggestion of impreciseness of the phrase "as necessary for the preservation of the mother's life or health" the court expressed the view that the word "health", which is not defined in the statute, "remains so vague in its interpretation and the practice under the act that there is no indication whether it includes varying degrees of mental as well as physical health" (App. 7).

The court held that the statute fails to give that certainty which due process of law requires in a criminal statute. Many defects were cited among which is the lack of a clear standard to guide either the doctor, the jury or the court and no determination as to what degree of mental or physical health or combination of the two is required to make an abortion legal or illegal under the Code.

It was noted that despite the general rule of noninterference by the law with medical judgment of physicians in treating their patients the inadequate and conflicting opinions now prevailing place the doctor in a "particularly unconscionable position" in abortion cases and that under the rule in *Peckham* v. *United States,* 96 U.S. App. D. C. 312 (1955), cert. denied 350 U.S. 912, and *Williams* v. *United States,* 78 U.S. App. D. C. 147 (1943), the burden of justifying his act shifts to the doctor once an abortion has been proved by the government. The court believed this to mean that the doctor is guilty and remains guilty unless a jury can be persuaded that his act was necessary for the preservation of the mother's life or health. The court held the view that a jury's

acceptance or nonacceptance of a doctor's interpretation of the "ambivalent and uncertain" word "health" should not determine the doctor's conviction and that his professional judgment made in good faith should not be challenged.

The court did not rule on all the issues raised but expressed the belief that "a far more scientific and appropriate statute could undoubtedly be framed than what remains of the 1901 legislation" and suggested that "Congress should re-examine the statute promptly in the light of current conditions".

ARGUMENT URGING AFFIRMANCE

Summary

The ineffective efforts by Congress and the legislatures of the several States to prohibit abortion have created a national problem which only this Court can correct.

The abortion statute of the District of Columbia, like the others, is conducive to crime and death and, like others, it has the effect of discriminating against women, particularly against women in low-income groups.

Because of the nature, scope and status of the abortion controversy and the difficulties resulting from the imprecise language of the statute it is important that this court review the judgment of the court below.

I. THE COURT HAS JURISDICTION OVER THIS APPEAL

The question of jurisdiction of this Court is ably discussed by the Government and nothing needs to be added.

II. THE DISTRICT COURT WAS CORRECT IN DECLARING THE ABORTION STATUTE TO BE UNCONSTITUTIONAL BY REASON OF ITS VAGUENESS

The word health has not been reduced to a uniform meaning. This is not the first time a court has been confronted with the word "health". Like so many words in the English language it is not confined to one interpreta-

tion or meaning and probably never will be. Webster defines it as a state of being hale or sound in body, mind or soul. These three words appear to be so inextricably bound together they cannot be separated in their relation to health. Since the word "soul" is rooted in theology rather than law the court's ability to interpret health as used in the statute without guidelines is not superior to that of a physician in making a decision to perform or not to perform an abortion. Only in the case of abortion is his ability questioned by laymen. And in no field are they less qualified to question.

The legal dilemma is confounded by the many qualifying adjectives attached to the word "health" in an effort to apply its meaning in various situations. The courts are continually confronted with it and have not yet succeeded in making it clear presumably because it defies clarity.

The word "health" in *Words and Phrases* (Vol. 19, p. 234) has 21 cross references including "feeble health", "ill health", "public health", "sound health" and "unsound health".

When used in connection with physical condition it includes appetite.[1] This connotes an understanding by the court that health does indeed include something other than physical condition possibly mental or spiritual.

Good health is not an absolute term.[2] The correctness of this statement cannot be seriously questioned since it is well known that women die from pregnancy without an attempt or desire to undergo an abortion. It is conceded that this is the exception rather than the rule but the desire to abort is also the exception.

The statute in question exempts the doctor from conviction in certain cases but never from prosecution if the

---

[1] *City of Cedartown* v. *Brooks*, 2 Ga. App. 583, 59 S.W. 836.

[2] *Bishop* v. *Metropolitan Mut. Assur. Co.*, 108 N.E.2d 830, 348 Ill. App. 386.

District Attorney elects to proceed against him. He is forced to justify his act to the satisfaction of a jury. If the defense attorney errs in selecting the jury the doctor may find himself in serious trouble if he fails to overcome a lurking prejudice which the attorney failed to discover.

The government need only to prove the abortion and from that point forward the doctor has the burden of proving himself innocent by justifying his act. If this interpretation of the statute is offensive to the Constitution it is because the statute leaves the court no opportunity to hold otherwise.

In further pursuit of the elusive meaning of "health" we find that bad temper is looked upon as a symptom of serious illness.[3] This is a reasonable layman's opinion. If "serious illness" is a state of health the opinion is supported by a Nebraska court which held that good health rests mostly in opinion.[4]

In another case an insurance company contended that a policy holder had misrepresented her condition of health by not revealing pregnancy at the time of making application. The court rejected the contention and held that the applicant's statement that she was in good health was not a misrepresentation though she was in fact pregnant at the time.[5] Apparently somebody thought pregnancy constituted bad or unsound health in which case our statute would require or at least permit abortion to preserve the mother's health.

It is well known that aside from death a pregnancy can and often does have adverse effects on the mother. This can happen even if the pregnancy is wanted. But if

---

[3] Abby, *The Sunday Star* (Washington) Aug. 23, 1970.

[4] *Willis* v. *Order of Railroad Telegraphers*, 139 Neb. 46, 296 N.W. 443.

[5] *American Order of Protection* v. *Stanley*, 5 Neb. (unof.) 132, 97 N.W. 467, 469.

"mental" is included as a facet of health it can be adversely affected by an *unwanted* pregnancy which is recognized as a source of anxiety.[6] Health is complete physical, mental and social well being. The court was correct in holding that the statute lacks the certainty which due process of law considers essential in a criminal statute.

The manifest intent of Congress with respect to its meaning is manifest only to the extent revealed in the statute itself and no matter how good the intent the statute cannot be uniformly applied within the requirements of due process of law.

In an effort to persuade this Court to agree with its view that the appellee should be put to his defense the government urges that the statute be interpreted to include the defense of good faith. Such an interpretation would amend the statute and the court is not at liberty to do so. *Peckham* v. *United States,* 96 U.S. App. D.C. 312 (1955), cert. denied, 350 U.S. 912, and *Williams* v. *United States,* 78 U.S. App. D.C. 147 (1943), in effect, denies to the doctor in an abortion case the benefit of the rule which requires the government to prove his guilt. The defendant must prove his innocence by going forward with the evidence.

He is licensed and authorized by law to practice the healing arts on the basis of his training and tested knowledge. But he is prohibited from exercising a free and independent judgment concerning the life and health of a woman who is pregnant. In this one instance he must submit to an examination by a jury of laymen and if he fails the test he goes to jail. He may remove a healthy appendix or a dentist may extract a sound tooth if a patient should request it but a doctor may not perform an abortion without approval of a jury. The government, in effect,

---

[6] *The Law Breakers* by M. Stanton Evans and Margaret Moore, p. 163.

asks this Court to compel this appellee to submit to such a test.

It is incredible that a jury should be asked to make such decisions but few question the sacredness of the law which subjects a doctor to criminal prosecution if he performs an abortion and makes him prove the necessity of it in order to stay out of jail. It intrudes into the private lives of people and interferes with the judgment of a physician in the treatment of his patients.

Such terms as "reasonable time", "sacrilegious", "real price" and others have been targets of the void-for-vagueness rule.[7] If men of common intelligence must guess at the meaning or application of a term it is too vague to satisfy due process of law.[8]

All person including the appellee could form an opinion as to what the District statute means but nobody could predetermine whether a jury which meets the standard of common intelligence would agree with his interpretation or send him to jail because they disagreed with him.

Definiteness has long been recognized as a standard of due process of law.[9] A doctor must decide under what conditions one abortion would be legal and another would not without benefit of statutory guidance and which or how many of his decisions would meet with the approval of a jury. The void-for-vagueness rule has developed over the years as a result of cases no less vague than the one now before the court. It follows, therefore, that the district court was correct and the judgment should be affirmed by this Court.

---

[7] 109 Pa. L. Rev. 93 (1960).

[8] *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926).

[9] *Tozer* v. *United States*, 52 F. Supp. 917 (1892).

III. The Abortion Statute Discriminates Against Women and Creates a Health Hazard [10]

Believed by some to be an instinctive drive, abortion in the human family is as old as history. It was fashionable among the ancient Greeks and Romans as a means of preserving the youthful figure. Even Hippocrates advised a young harpist how to end her pregnancy. Plato would have made it mandatory after 40.

Prior to 1870 Japan controlled her population by infanticide. In the so-called lower strata of the animal kingdom the practice of abandoning the young or killing them outright at birth is so well known it needs no documentation.

With the advent of the Judaic-Christian ethic abortion fell into disfavor and was declared by St. Augustine to be murder. The woman was severely punished. The enormity of her sin was determined by the degree of advancement. Abortion after animation barred the fetus from the celestial realm and relegated it to *limbus infantum*. Today it is widely regarded as murder if the abortion is induced but not as death of a human if it is spontaneous. The most

---

[10] This material is the result of a study of books, articles and papers by professional people who have expressed concern over the problems related to abortion in America, principally as follows:

Abortion in America, edited by Harold Rosen, M.D., Ph.D., Beacon Press, is a collection of works by noted authorities.

Society, Crime and Criminal Careers, Don C. Gibbons, Prentice Hall, Inc., Englewood Cliffs, N. J.

The Healers, Anonymous, M.D., G. P. Putnam's Sons, New York, N.Y., p. 151.

Harriet Pilpel, a New York lawyer, in The Case for Legalized Abortion, p. 97.

Jerome M. Kummer, Psychiatrist, Assoc. Clinical Professor of Psychiatry, Univ. of California at Los Angeles, School of Medicine, in The Case for Legalized Abortion, p. 114.

Newsweek, Apr. 13, 1970, p. 53.

New York Times, June 8, 1970, p. 29, col. 1.

Washington Post, Feb. 24, 1970, p. B 2.

vigorous opposition comes from the Catholic religion. Modern day attitudes concerning abortion have their roots in this concept. It is an unconscious prejudice in the guise of morality.

If social caste cannot be identified by the clothes women wear it can be identified by the kind of abortions they buy. With money, abortions may easily be obtained—even in the shadow of the legislative halls where they were banned. The degree of legality is measured by the money the woman can pay. The price paid by the poor is often death—always blood, sweat and tears.

Because of this economic inequality, matched only by human desperation, areas in large city hospitals are reserved for women who have sought the only kind of abortions available to them. They are desperately ill. Many die while their affluent sisters receive tender care in comfortable facilities under the watchful eye of a dependable medical technician.

The malady is not restricted to teen age girls and the unmarried. Wives suffer the consequences, including death, along with the others. The greatest number of abortions are sought by married women.

No matter what the intent of Congress may have been when the statute was passed these are the conditions which it preserves: not the lives and health of women. There is nothing to show and no reason to believe that the District of Columbia is excluded from the system which operates universally.

It degrades and discriminates against women by reason of their economic status and denies to them the right of choice as free people. It also corrupts the medical profession.

Many doctors are unwilling or reluctant to perform this delicate service for their patients because of the risk involved. It is damaging to their reputation to be accused

of engaging in unlawful practices. If the doctor acts in good faith but the jury does not believe him his good faith does him no good. To meet this problem, human ingenuity has found a way—for those who can pay. Those who can not pay find their own way—a way far less desirable. Often fatal. If the odious word is replaced with a scientific, sanitary term the operation is successful, the district attorney has more time to devote to other pressing matters and everybody is happy. The happy patient can and probably will refer legitimate business to the doctor. If he forces her to seek medical help elsewhere by refusing to give the relief she desperately desires he stands to lose. This he cannot afford.

It can be argued that the law was designed to prevent such abuse. But that cannot be. These innovations are of more recent vintage and the poor construction of the statute brought about the abuse.

Much of the practice escapes legal opposition although it is technically proscribed by law. But when difficulty arises the woman becomes the pawn on the chessboard. Although she is as guilty as the doctor she must testify against him. The doctor has fallen from grace and for his mistake he is driven into the illegitimate practice of abortion—his only means of earning a living—and the bitter fruits of the law are again harvested by women who cannot afford the better kind. This is the tangible result of abortion statutes.

Although accurate statistics are difficult to obtain, abortions in the United States are estimated to be in excess of a million a year. In New York City 93 per cent of the therapeutic abortions are on white women. 42 per cent of the pregnancy-related deaths result from out-of-hospital abortions. Fifty per cent of these are Negro and 44 per cent Puerto Rican. About one-third of the out-of-hospital abortions are performed by doctors.

The efficiency of modern medical knowledge makes abortion-related deaths unnecessary. Therefore, the conclusion

is forced upon us that the deaths which do occur are the direct result of legislation which cannot be interpreted in the context of medical need.

It is not yet a popular view that the nation's disturbing crime problem and others are traceable at least indirectly to abortion statutes. However, a good case has been made for it.

The abortion statute considers only the life or health of the mother without regard for the life or health of the child after it is born.

No statute can compel a prospective mother to accept her offspring mentally and emotionally and no statute can compel her to give the child the kind of emotional security it needs and must have if it is to become a healthy adult. Some women are simply not capable of doing so. They never achieve the capacity for maternal responsibility and most women do not welcome it at *all* times. If pregnancy is forced upon her, which is often the case, particularly in the case of her rejection if she desires abortion, it can result in a maternal rejection of the child. This condition can begin *before birth.* This will affect the child's life as long as it lives. Child guidance clinics and juvenile courts are filled with children who were born in a background of maternal rejection. Where this occurs it can result in schizoid personality, gang delinquents and criminal psychopaths.

The District statute and others similarly worded would forbid an abortion even if it could be predicted that the mother would kill the child at birth like the mother in the zoo who is deprived of her natural environment.

A husband can prevent a doctor from performing an abortion on his wife. His wishes are superior. In a survey of ten cases where abortion was denied, seven by the hospital and three by the husband, one committed suicide, six had criminal abortions, one divorced her husband im-

mediately after the birth, one killed herself and all h children and one registered as a single woman and obtain an abortion. In some cases wives are forced by their hus bands to secure an abortion even when they would prefe to have the child. In either case it is the husband wh decides rather than the wife.

Clearly, then, the abortion statute discriminates agains women and creates a dangerous health hazard. Health good or bad, is too important to be committed to the judg ment of juries.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

LOLA BOSWELL,
Attorney for Amici Curiae

September, 1970